83-1992

No. _____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1983

THE HONORABLE HARRY EUGENE CLAIBORNE,
UNITED STATES DISTRICT JUDGE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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June 4, 1984

QUESTIONS PRESENTED

1. Can the Executive's claim to have discretionary power to investigate and prosecute a sitting federal judge for his conduct in office be reconciled with the constitutional provisions designed to guarantee judicial independence and to keep separate the powers of government?

2. Does a sitting federal judge have a right to have his claim that the Executive's decisions to investigate and prosecute him for his conduct in office were motivated in fact by an intent to drive him from judicial office and to punish him for the manner in which he exercised the judicial power resolved before he is required to submit to trial on the Executive's charges?*

*The caption lists all parties to the proceedings in the court of appeals. Petitioner notes here, as he did in the courts below, that all federal judges have interests that will be substantially affected by the disposition of the questions presented here and by the disposition of questions still pending before the district court.

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PETITION FOR WRIT OF CERTIORARI TO
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United States District Judge Harry Eugene Claiborne petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the judgment that court entered against him.

OPINIONS BELOW

On January 11, 1984, the district court entered an order denying petition-

er's motion to quash the indictment and dismiss the proceedings (App. 40). That decision is not reported. The court of appeals affirmed the district court's decision (App. 1-39). That decision is reported. United States v. Claiborne, 727 F.2d 842 (9th Cir. 1984).

JURISDICTIONAL STATEMENT

This petition seeks review of a judgment that the United States Court of Appeals entered on March 5, 1984. On April 26, 1984, Justice Rehnquist entered an order extending the time within which this petition could be filed to Sunday, June 3. This petition was filed on June 4, 1984. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's claims are based upon the provisions of the United States

Constitution governing the tenure and removal of federal judges. U.S. Const., art. III, § 1; art. I, § 2, cl. 5, and § 3, cl. 6 and cl. 7; and art. II, § 4. In order to resolve the questions presented, the Court will also have to construe provisions of the Constitution intended to allocate and keep separate the powers of the three branches of government (U.S. Const., art. I, § 1; art. II, § 1, cl. 1, § 2, cl. 1 and cl. 2, and § 3; and art. III, § 1 and § 2, cl. 1 and cl. 3) and the statute codifying the requirements for impartiality [28 U.S.C. § 455 (1982)]. These provisions have been included in the appendix to this petition (App. 83-85).

STATEMENT OF THE CASE

The Honorable Harry Eugene Claiborne is Chief Judge of the United States District Court for the District of Nevada. On December 8, 1983, attorneys for the United States filed an indictment alleging

that by his conduct in office Judge Claiborne had committed felony crimes against the laws of the United States (App. 43-54). On January 3, 1984, Judge Claiborne moved to quash the indictment and dismiss the proceedings (App. 55-64). In that motion he asserted two separate constitutional claims. First, he claimed that the constitutional provisions designed to keep separate the powers of government and to protect the independence of the Judiciary required that the impeachment and removal by the Legislative Branch precede the exercise of prosecutorial discretion by the Executive to compel a federal court to exercise criminal jurisdiction over one of its judges. Second, and alternatively, he claimed that at a minimum the Constitution prohibited an Executive prosecution initiated specifically for the purpose of punishing a

judge for his judicial acts and in retaliation for the manner in which he had exercised the judicial function. Id. In support of this second claim, Judge Claiborne alleged that the indictment and the decision to prosecute were the product of a three-year war initiated and maintained for one purpose: to drive Judge Claiborne from office and to punish him for the manner in which he executed the judicial office (App. 59-60, 66-72). He made a specific proffer and supplied affidavits and published reports making it clear that his allegations were in not way speculative (App 73-81). He claimed that the rights a judge derived from Article III of the Constitution and the need to prevent the Executive from impermissably intervening in the judicial function made it necessary that the court hear evidence in support of these claims and, if they

were proven, prohibit the Executive from proceeding to trial. The district court considered the proffer and rejected both claims without receiving evidence (App. 40).

The district court entered its order denying the motion on January 11, 1984 (App. 40). On January 20, 1984, Judge Claiborne noted his appeal from that order. The court of appeals filed its opinion and entered judgment on March 5, 1984 (App. 1, 41).

The court of appeals agreed that Judge Claiborne's first claim had presented substantial and unresolved constitutional issues and that the order denying that claim had been a final and appealable order under 28 U.S.C. § 1291 pursuant to the principles articulated by this Court in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545-47

(1949); Abney v. United States, 431 U.S. 651, 659-60 (1977); and Helstoski v. Meanor, 442 U.S. 500, 506-08 (1979). The court affirmed the district court on the merits. The court went on to hold that to the extent the district court had denied Judge Claiborne's second claim, its order was not appealable, relying on this Court's decision in United States v. Hollywood Motor Car Co., 458 U.S. 263, 270 (1982) (per curiam) (orders denying due process challenges to vindictive prosecutions not immediately appealable) (App. 30-31). The court directed that its mandate issue forthwith and simultaneously entered an order denying Judge Claiborne's application for a stay sufficient to permit him to petition this Court for review. Judge Claiborne applied to this Court for a stay of trial proceedings pending the filing and disposition of the

petition. That application was initially denied by the Circuit Justice, and later by the full court, Claiborne v. United States, __ U.S. __, 104 S. Ct. 1401 (March 12, 1984)(Rehnquist, Circuit Justice in chambers); __ U.S. __, 104 S.Ct. 1463 (March 14, 1984). The trial began on March 12 and ended on April 13. The jury was unable to reach a verdict, and a mistrial was declared. The district court has set the case for re-trial beginning July 31, 1984.

REASON WHY REVIEW SHOULD BE GRANTED

1. This petition will be brief. In other contexts, this Court has twice in the past two years acknowledged that the judicial independence is sufficiently central to our constitutional scheme of government to command this Court's attention. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50

(1982) (lack of Article III protections precludes assignment of compulsory jurisdiction over contract claims of bankrupts to Article I bankruptcy judges), and Pulliam v. Allen, __ U.S. __, 52 U.S.L.W. 4525 (May 14, 1984) (common law immunity does not bar award of declaratory and injunctive relief and attorneys fees under federal civil rights statutes against state court magistrates). The Justices of this Court must be fully aware of the underlying constitutional issues raised by this petition and the practical consequences to the Judiciary. See, e.g., Petition for Writ of Certiorari, Hastings v. United States, __ U.S. __, 103 S.Ct. 1188 (1983) (cert. denied) (similar claims presented); cf., In Re Petition to Copy and Inspect Grand Jury Records, 576 F. Supp. 1275 (S.D. Fla. 1984), appeal pending, No. 84-5003 (11th Cir.)(special

panel) and Hastings v. Judicial Conference, No. 83-3850 (D.D.C. filed Dec. 23, 1983) (for illustrations of consequences upon return of acquitted district judge upon return to the bench). The Executive's exercise of its claimed powers here has again made the federal judiciary notorious and newsworthy. See, e.g., J. Riley, Stacked Deck for a Judge? Focus Shifts to Probe Tactics, 6 Nat'l L. J. 1 (Jan. 23, 1984) and The Deal Conforte Cut: Is It Legal?, id. at 30 (reporting conflicts between federal agents and judges in Nevada). In essence, this petition simply asks this Court to act upon that awareness and acknowledge that the fundamental constitutional questions concerning the protections necessary to maintain the constitutionally mandated independence of federal judges are as deserving of this Court's attention as are questions concern-

ing the scope of common law immunities that must be afforded state court judicial officers.

2. The constitutional questions are fundamental. The Honorable Harry Eugene Claiborne is a federal judge. Pursuant to Articles I, II, and III of the Constitution, he is entitled to hold office and exercise the judicial power of the United States unless and until he resigns or has been impeached by the House of Representatives and tried and convicted by the Senate of "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const., art. I, § 2, cl. 5, and § 3, cl. 6; art. II, § 4; and art. III, §§ 1 and 2. The framers designed these provisions to protect members of the Judiciary from coercion or interference by the Executive. They concluded that impeachment and removal by Congress was the only remedy for judicial misconduct "consistent with

the necessary independence of a judicial character." The Federalist, No. 79 (Hamilton) 513-14 (Mod. Lib. ed. 1937).

Until recent times the framers' understanding was shared by all three branches of government, here and in England. The Crown has never prosecuted a judge holding good behavior tenure prior to removal or resignation. That constitutional tradition is 283 years old. Act of Settlement, 1700, 12 & 13 Will. 3, ch. 2 & 3. For the first one hundred fifty years of this nation's history, the Executive never attempted to prosecute an Article III judge; charges of serious judicial misconduct were invariably referred to the House of Representatives. See J. Borkin, The Corrupt Judge (1962) (for a summary).

In the past two years, two circuits have considered a federal judge's claim

that the Constitution defines a mandatory sequence of remedies for alleged criminal misconduct in office. United States v. Claiborne, supra, and United States v. Hastings, 681 F.2d 706 (11th Cir. 1982), cert. denied, __ U.S. __, 103 S.Ct. 1188 (1983). Both have concluded that the right asserted by the accused judge "would be wholly deprived of meaning if he were forced to undergo trial before he could assert it." United States v. Claiborne, App. 8, quoting from United States v. Hastings, 681 F.2d 706, 708. Both have recognized that the claim presents substantial issues of interbranch comity that directly effect the independence of Article III judges and that have not been resolved by this Court. Claiborne, id.; Hastings, 681 F.2d 706, 708-09. This Court should grant review to resolve these questions.

3. The Executive has asserted that the Attorney General, the United States Attorneys, and their subordinates have a discretionary power of prosecution that can be exercised against federal judges for the very conduct by which those judges exercise the judicial power in cases to which the Executive is a party. The Executive claims that this power necessarily embraces the power to employ "informant[s], undercover operatives, wire intercepts, electronic surveillance and grand jury process" to investigate judicial conduct it finds suspect.[1] The use of mail intercepts and purchased testimony have been added to the list of claimed powers by this case. The Justice Department has acknowledged that, in the first five years of its existence (1976-

1. Brief for Appellee United States of America, at 42-43, United States v. Hastings, supra.

1980), the Criminal Division's Public Integrity Section exercised some or all of these claimed powers to investigate alleged criminal conduct by twenty-five federal judges and that, in the year preceding that acknowledgement, it had exercised discretion in declining to prosecute in four instances.[2]

The information that is not known and cannot be discovered is perhaps more important. We do not know how many federal judges the Public Integrity Section has investigated since 1980, or how many have been formally or informally investigated by local United States Attorneys or other federal agencies. The Executive has not reported whether any

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2. Judicial Tenure and Discipline-1979-80: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 1st and 2d Sess. (Comm. Print. 1980), 160 and 160 n.4 (Statement of Maurice Rosenberg, Assistant Attorney General).

of these judges have been made aware of the investigations or their results, or if any have been informed of the bases upon which prosecutorial discretion was exercised in their favor. We do not know and cannot know how many citizens now seek to vindicate their constitutional rights before judges who have been made aware that 'there but for the grace of the prosecutor go I'.

There are five hundred United States District Judges in active service. Almost fifty percent of the cases coming before them involve disputes to which the Executive is a party.[3] Daily, these judges must deal with Justice Department attorneys and Assistant United States Attorneys employed to assert the Executive's interests and, on the criminal side, to exer-

3. See, e.g., [1983] Annual Report of the Director of the Administrative Office of the United States Courts.

cise its powers. Daily, these judges are called upon to accept or reject the work of these attorneys and of the Executive's investigative agencies in controversies affecting the most fundamental rights of the people - the other parties to those actions. Friction is inevitable. This Court should grant review to determine the extent to which these judges may properly be subjected to the investigative and prosecutorial powers held by the attorneys who represent the Executive before their courts.

4. Judge Claiborne's motion presented a second constitutional claim. He alleged and offered to prove that the Executive's decisions to investigate and prosecute him were motivated in fact by an intent to drive him from judicial office and to punish him for the manner in which he had exercised the judicial power

in cases to which the Executive had been a party. He claimed that, at a minimum, the Constitution must be construed to afford a federal judge protections comparable to the protections afforded individual members of Congress under the speech and debate clause. See, e.g., United States v. Brewster, 408 U.S. 501 (1972) (Speech and debate immunity limited to protect legislative acts from attack). Judge Claiborne asserted that judges must be protected from exercises of Executive discretion intended directly to undermine the judicial function.

That claim was a claim to immunity from having to endure the burdens of trial and was based upon rights Judge Claiborne holds as a judge, not upon due process rights he holds as an individual. On appeal, Judge Claiborne urged that the district court's order denying that claim

was comparable to an order denying a congressman's fact-based claim that the Speech and Debate Clause barred a specific prosecution or an individual's fact-based claim that the Double Jeopardy clause barred a specific prosecution. See Helstoski v. Meanor, 442 U.S. 500 (1979), and Abney v. United States, 431 U.S. 651 (1977).

The court of appeals thought review of that claim was barred by this Court's decision in United States v. Hollywood Motor Car Co., 458 U.S. 263 (1982) (orders denying due process challenges to prosecution not immediately appealable). By equating an Article III judge's claim to constitutional immunity from prosecution with an individual's claim that Executive conduct violated his or her due process rights, the court of appeals effectively denied the claim on the merits. The

rights Judge Claiborne asserted by that claim also "would be wholly deprived of meaning if he were forced to undergo trial before he could assert it." If the Executive has the power to force a federal judge to endure the costs and burdens of trial, the Executive has the power to punish a judge. This Court should grant review to determine whether the court of appeals decision on this issue is consistent with the principles this Court has applied in cases such as Helstoski or Abney.

5. The criminal prosecution of a federal judge must (as it has here) result in such substantial disruptions of the judicial business and departures from the accepted and usual course of judicial proceedings as to call for guidance from this Court in the exercise of its supervisory powers. The necessary and the

probable disruptions are apparent. The Executive's decision to prosecute an active judge must necessarily cause considerable disruption in the management of the judicial business. The recusals in the District of Nevada and the Ninth Circuit and the extent to which the Chief Justice has had to use the designation power to select judges to hear this and related cases illustrate one part of the problem.

Those disruptions also call into question the impartiality of the Judiciary. Decisions required in this and any comparable case must necessarily define privileges and immunities incident to the federal judicial office. The judges who preside will be resolving questions that substantially affect their own interests and the interests of every other federal judge. The appearance of impartiality is

also destroyed. Judges are tried by specially designated judges. Reasonable observers must reasonably question whether a presiding judge can maintain impartiality when the conduct of a fellow judge is the subject of the prosecution.

This Court has already ruled that, in controversies between an Article III judge and another branch of government requiring construction of section 1 of Article III, the Judiciary is as a matter of law deprived of the required impartiality. United States v. Will, 449 U.S. 200, 210-14 (1980). There the doctrine of necessity compelled a reluctant Court to act because there was no other forum where the controversy could be adjudicated. Id. at 214-18. Here, however, the necessity to proceed beyond the jurisdictional questions presented is not apparent. The Constitution specifies a procedure by

which and a forum in which a federal judge can be prosecuted and tried for the crimes alleged here.

Further significant disruptions must also flow from an acquitted judge's return to the bench. The practical effect of a criminal prosecution followed by an acquittal is that the Executive may have effectively disqualified the acquitted judge from exercising the judicial power. In the bitter aftermath of this litigation, Judge Claiborne may be called upon to resume the role of impartial judge in controversies to which his present adversary is a party. It will thereafter be in the power of the government's attorneys to argue that the judge must disqualify himself because "his impartiality might reasonably be questioned." See 28 U.S.C. § 455(a) (1982). Indeed, any individual criminal defendant might question whether

a once-acquitted judge would have the impartiality or independence to again challenge the Executive by ruling against it on difficult or close questions. It would be hard to declare that such a defendant has no reasonable grounds for such a challenge. See Reid v. Covert, 354 U.S. 1, 22 (1957) (due process requires criminal charges against non-military personnel be tried before judge enjoining Article III protections).

The United States is party to all criminal and numerous and substantial civil actions in the district courts. Every litigant coming before those courts is entitled to an impartial assignment of judges. Every district judge is entitled to expect a fair distribution of the judicial work of the district. To cripple one judge is not fair to the judge crippled nor to the remaining judges nor

to the litigants who come before that court. The Constitution does not provide for handicapped Article III judges.

The Judiciary has demonstrated that it has the ability to adapt its normal procedures to address the problems presented by the abnormal case. But the necessity for judges to create and employ special procedures to address the problems presented by a case which requires that federal judges exercise the judicial power to resolve charges brought by the Executive against another federal judge are unique and require special sensitivity. At a minimum, the procedures by which such cases are handled should be uniform among the circuits and designed to minimize the disruptions during and in the aftermath of these cases. The problems this case has caused and will create illustrate clearly the kinds of

disruptions the Judiciary will have to confront if the practice is to continue. Simply stated, these disruptions may threaten the Judiciary's ability to administer its own affairs and cause reasonable observers to question the impartiality with which such cases are decided. This Court should exercise its supervisory jurisdiction to provide the necessary guidance.

6. The decision below conflicts with principles this Court has consistently held necessary to maintain an independent Judiciary. In 1982, this Court twice reiterated the history, the function, and the importance of the doctrine of judicial independence. Northern Pipeline, supra, and Nixon v. Fitzgerald, 457 U.S. 731 (1982). That doctrine was developed to assure the people that federal judges could and would exercise the judicial

power impartially and without fear of consequences to themselves.

> This was a doctrine "'not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.'"

Nixon v. Fitzgerald, 457 U.S. 731, 745-46 [quoting Pierson v. Ray, 386 U.S. 547, 554 (1967), quoting Scott v. Stansfield, L.R. 3 Ex. 220, 223 (1868)]. Its importance is clear:

> In sum, our Constitution unambiguously enunciates a fundamental principle--that the "judicial Power of the United States" must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence.

Northern Pipeline, 458 U.S. 50, 60 (plurality opinion).

In Northern, the Court was required

to consider the effect of the differences in judicial independence between Article III judges constitutionally guaranteed "life tenure, subject only to removal by impeachment . . . and a fixed and irreducible compensation" and the new bankruptcy judges appointed to fourteen-year terms, subject to discipline or removal by the judicial councils, and guaranteed only the salary protection afforded all federal civil officers. A majority of the Justices were persuaded that the possibilities for interference by the Executive, Congress, and by judicial colleagues posed sufficient danger that Congress could not delegate mandatory jurisdiction over common law contract claims to such judges [458 U.S. 50, 52-89 (plurality opinion); see also, id. at 89-92 (Rehnquist, J., concurring)]. This Court should now consider whether judges who sit subject to

the Executive's prosecutorial discretion have the independence necessary to adjudicate claims involving our most fundamental rights.

This Court's decision in Nixon v. Fitzgerald also makes it clear that petitioner here is not seeking relief that would place him above the law. Petitioner claims no immunity; he claims only that, unless he chooses to resign, the Constitution defines the correct sequence by which his judicial conduct may be challenged and judged: impeachment and removal first, and then, and only then, prosecution and trial. He claims that both the Constitution and the doctrine of separation of procedures of powers confer upon him a right to insist that that sequence be followed.

In Nixon, this Court addressed the claim that immunity from civil liability for conduct in office would make the

President a 'man so high he was above the law.' In rejecting the claim, the Court ruled:

> A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive. There remains the constitutional remedy of impeachment.[39] . . .
>
> The existence of alternative remedies and deterrents establishes that absolute immunity will not place the President "above the law." For the President, as for judges and prosecutors, absolute immunity merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends.

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39. The same remedy plays a central role with respect to the misconduct of federal judges, who also possess absolute immunity. See Kaufman, Chilling Judicial Independence, 88 Yale L.J. 681, 690-706 (1979). Congressmen may be removed from office by a vote of their colleagues. U.S. Const. Art. I, § 5, cl. 2.

457 U.S. at 757-58 (other footnotes omitted).

The rule of absolute immunity from civil liability for the President or for federal judges may advance compelling public ends, but it does so at the expense of substantial private rights. In that context, the constitutional remedy of impeachment is a limited alternative: it protects "the public interest in the rule of law," but does nothing to remedy the private wrong.

A requirement that the constitutional remedy of impeachment precede the Executive's exercise of prosecutorial discretion against a federal judge advances a compelling public end: the interest of the people in having an independent Judiciary. It does so at the expense of neither public nor private rights. As a remedy for 'high Crimes and Misdemeanors' in office, the constitutional remedy is a true remedy. In that context it vindi-

cates the same rights as the criminal laws. For a judge, it is a supplemental, not an alternative, remedy. Far from placing judges above the law, it subjects them to the law and defines the correct sequence of remedies for official misconduct. After a judge's removal from office, the Executive may prosecute and the Judiciary may judge him like any other man.

We aspire to have a 'government of laws, not of men;' but those laws must be administered by men, and we have always known that 'men entrusted with power tend to abuse it.' The judicial office exists to assure that we remain a government of laws. The guarantees of life tenure and irreducible compensation were given to insulate the judicial officer from the temptations of political ambition and the fear of personal consequence. Both

the temptations and the fear encourage abuse of official power. Thcse guarantees were granted, not to protect the judge, but to assure the people that we would retain 'a government of laws, not of men.'

The court of appeals decision threatens tremendous harm to one of the most treasured values of our constitutional system. That court yielded that which was not its to give: the right of the people to an independent Judiciary. This Court should not permit such a decision to stand as a precedent for the future unless it is fully satisfied that the delicate balance can be preserved.

CONCLUSION

Petitioner respectfully urges that this Court grant the petition and issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit

to review the judgment that court entered against him.

Respectfully submitted,

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